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Educators Mutual Insurance: Association, a non-profit corporation v. Joel Evans, an individual : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

EDUCATORS MUTUAL INSURANCE ASSOCIATION, a non-profit corporation, Plaintiff, vs. JOEL EVANS, an individual, Defendant	:	**PLAINTIFF'S REPLY BRIEF TO EDUCATORS MUTUAL INSURANCE ASSOCIATION** Appellate Case No.: 20090527
JOEL EVANS, Third Party and Counterclaim Plaintiff, vs. EDUCATORS MUTUAL INSURANCE ASSOCIATION, Counterclaim Defendant. And SALT LAKE CITY CORPORATION, Third Party Defendant,	:	

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(Trial Court Case No. 040924591)

Appellant Joel Evans, through his undersigned counsel, submits his Reply Brief to Educators Mutual Insurance Association ("Educators") Brief.

REPLY TO EDUCATORS' "STATEMENT OF ISSUES AND STANDARDS OF REVIEW"

Two aspects of Educators' Statement of the Issues and Standards of Review section warrant comment. The first is that Educators repeatedly characterizes itself as an "independent plan administrator." Educators Brief, pp. 2-4, 12. However, Educators never provides any information to justify such a self-serving characterization of its role in this matter. In fact, it is clear based on the allegations of the original Complaint and other pleadings filed in the case that Salt Lake City Corporation ("SLCC") contracted with Educators to provide administrative services for SLCC's disability benefits plan. Educators is charged with carrying out the dictates of SLCC. Educators' use of the word "independent" to describe its role is simply an empty attempt by Educators to bolster its own case.

The second noteworthy aspect of Educators' Statement of the Issues and Standards of Review is its failure to properly analyze the appropriate standard of review in this case. Educators first states that a deferential standard of review is appropriate because Educators stands in the shoes of the Utah State Retirement Board ("USRB") in providing "written documentation which demonstrates that the interpretation or definition [of a

benefits program] promotes uniformity in the administration of its systems or maintains the actuarial soundness of the systems, plans or programs" (citing Sindt v. Retirement Board, 2007 UT 16, ¶ 5). Educators Brief, p. 3. However, Educators is not the USRB, nor does it claim to be. USRB acts as an independent state agency administering various systems, plans or programs of governmental entities under, among other statutes, PELTDA. U.C.A. § 49-11-201. While an abuse of discretion standard of review may apply to the actions of that state agency under some circumstances, it does not follow that such a deferential standard of review applies to the actions of Educators, a business competing in the private marketplace.

An abuse of discretion standard of review is especially inappropriate where Educators asserts, as it does on p. 3 of its Brief, that it mechanically enforced "...a uniform 30-day appeal deadline and a universally applicable requirement that Mr. Evans provide information relevant to his disability." If, in fact, Educators is simply rigorously enforcing the letter of the law with exactness and regardless of the varying circumstances of individual claimants, what "discretion" was exercised by Educators to which this Court should defer?

The second reason for Educators' assertion that a deferential standard of review is appropriate is to borrow analysis from the Employee Retirement Income Security Act of 1974 ("ERISA"). In its analysis Educators fundamentally misunderstands the application of a deferential standard of review within ERISA. Educators wrongly states that "federal courts review plan administrator's denial of benefits under an 'arbitrary and capricious' standard...". Educators' Brief, p. 3.

In fact the default standard of review in ERISA is a *de novo* standard of review. Firestone Tire and Rubber Co. vs. Bruch, 489 U.S. 101,115 (1989). Indeed, the Supreme Court has specifically stated that nothing in ERISA automatically entitles plan administrators to a deferential standard of review. Rush Prudential HMO v. Moran, 536 U.S. 355, 385 (2002) ("Not only is there no ERISA provision directly providing a lenient standard for judicial review of benefit denials, but there is no requirement necessarily entailing such an effect even indirectly"). It is only where the language of the document that establishes an ERISA plan confers discretionary authority to interpret the terms of the plan or determine eligibility for plan benefits on a plan fiduciary that a deferential standard of review in the judiciary is triggered. Bruch, 489 U.S. at 115. Educators makes no attempt to identify any language in the document under which the SLCC disability plan is established or operated that contains language conferring discretion upon either SLCC or Educators. In fact, the documents that establish the SLCC disability plan do not contain any language conferring discretion to interpret the terms of the plan and determine eligibility for benefits on either SLCC or Educators.[1]

REPLY TO EDUCATORS' STATEMENT OF FACTS

Educators repeatedly references that it initially approved Evans' disability benefits for the initial 24 month, "own occupation" disability period only, told Evans that his benefits would cease after 24 months and that Evans did not timely appeal the

[1] Educators cites In re: Marriage of Gonzales, 2000 UT 28, ¶ 16, fn.2 for the proposition that "this court should therefore follow the federal standard of review applied in reviewing decisions of independent plan administrators, even though the plan here is not governed by ERISA." Educators' Brief, p. 3. However, while Marriage of Gonzales contains a stimulating discussion of principles involving statutory construction, there is no reference to either ERISA or the appropriate standard of review to be applied when reviewing decisions of disability plan administrators.

determination that his benefits would cease after the initial two year period. Educators Brief pp. 6-7, 8, 9, and 19. However, it was impossible for Educators to know on September 10, 2002 when it initially approved Evans disability benefits, whether, at the expiration of the 24 month "own occupation" disability period, Evans would be disabled from "any occupation" and thus be entitled to additional benefits. Moreover, Evans had no ability to know what his own physical condition would be at the expiration of the initial 24 month period. He had every intention and hope of returning to work, if not as a police officer in some other capacity, as soon as possible. It was not until Evans' initial two year "own occupation" disability benefit ended in January, 2004, that either he or Educators were in a position to meaningfully and intelligently evaluate whether his condition justified continued disability benefits for the inability to work in any occupation.

ARGUMENT

I. Evans' Claims Are Not Barred by His Failure to Comply With Procedural Requirements

The crux of Educators' argument is that it had the ability to set up and strictly enforce a variety of hurdles for claimants such as Evans to jump over as part of its claims review process. The first hurdle is a requirement for a claimant to appeal an initial denial of his claim within 60 days of the decision. Then, if that initial appeal is denied, Educators claims the right to require a claimant to file a second level appeal with Educators' Board of Directors within 30 days after the denial of the first appeal. If a

claimant fails to comply with either deadline, Educators asserts that the claimant loses any ability to appeal, arbitrate or litigate the claim.

Educators argument fails because PELTDA is silent as to any required exhaustion of claims review appeals. The statute is not without any reference to time frames. UCA §49-21-401(9) requires that claims by employees for disability benefits under PELTDA are barred if not commenced within one year from the eligible employee's date of disability unless USRB determines that, under the surrounding facts and circumstances, the eligible employee's failure to comply with the time limitations was reasonable. Thus, not only does PELTDA not impose the sort of short and varying time frames Educators insists must be unwaveringly applied, the time frame it does establish for bringing a suit for denied disability benefits is within a year from the disability. Even in that situation, the USRB has the ability to take into account "surrounding facts and circumstances" in allowing a longer period of time for claims to be brought if the claimant's failure to bring a claim within a year was reasonable. Id. Thus, both the time frame in the PELTDA and the allowance for some flexibility in the enforcement of that time frame are substantially different than Educators' scheme.

The flexibility referenced in UCA §49-21-401(9) with regard to extending the time frames within which a claim can be brought for disability benefits is consistent with the "notice prejudice" rule found in Utah's insurance code at U.C.A. §31-A-21-312(2). That statute allows claims to be brought later than the time frames required in insurance policies so long as the insurer cannot demonstrate any prejudice arising from the delay.

This discussion of the notice prejudice rule, raised by Evans in his opening brief, brings no response from Educators.

Educators relies on Evans' prior counsel's forthright admission that his calendaring error of a 60-day rather than a 30-day time frame for submitting Evans' second appeal of the denied claim justifies Educators' refusal to consider Evans' tardy appeal. Evans' counsel asked for mercy but Educators was having none of it. And despite its request that this Court allow it to rigorously, and without exception, enforce its appeal time frames, it identifies no good public policy reasons for imposing such harsh penalties on claimants or their attorneys. Not coincidentally, this hard line results in an immediate financial benefit to SLCC because it reduces disability benefit payments SLCC would otherwise be required to make to worthy claimants.

Educators effectively seeks to impose two *de facto* limitation of action periods on claimants. Either the first 60-day time frame for the initial appeal of a denied claim or the second 30-day time period will certainly trip up some unwary claimants or their counsel and unfairly deprive public safety employees of benefits they are worthy to receive. Both the terms of SLCC's disability plan and Educators' administration of that plan violate both the letter and the spirit of PELTDA. SLCC and Educators' overly aggressive approach is unworthy of the public safety employees PELTDA seeks to protect.

Educators argues that the "...30-day appeal deadline in the plan is no more unreasonable than the 30-day appeal deadline in Rule 4 of the Utah Rules of Appellate Procedure." Educators' Brief p. 16. However, a 30-day appeal deadline in the Utah

Rules of Appellate Procedure is not designed for use by the general public and Educators is not the Utah state judiciary. The claim review procedures set up for SLCC's disability plan will often, if not usually, be utilized by unrepresented claimants. These individuals will frequently not appreciate the need to strictly adhere to the time frames, nor will they understand the adverse effect on their claims if they do not meet those deadlines. In addition, neither SLCC nor Educators is without financial self-interest in winnowing out as many claims as possible and saving SLCC money that would otherwise be spent on disability claims. Utah's court processes and the Utah Rules of Appellate Procedure have no such self-interest in mind in establishing their deadlines.

Educators claims that there is logic to its initial 60-day appeal period and its second 30-day appeal period because

> ...the first appeal to the claims review committee--which may require the gathering of additional information—is 60 days, a deadline Mr. Evans satisfied. The second appeal to the Board of Directors which does not require anything more than a short letter—is 30 days, a deadline Mr. Evans did not satisfy.

Educators Brief pp. 15--16. The problem in Educators' analysis is that neither level of appeal *mandates* the gathering of information not already submitted and in the possession of Educators or the claims review committee. Similarly, both levels of appeal *allow* the gathering and submission of additional information. Educators' argument to justify the difference between the two deadlines is artificial and fails to pursuade.

Educators also faults Evans for failing to provide Educators with medical information when Evans appealed Educators' termination of his disability benefits after the initial two-year "own occupation" time frame. But Evans did challenge the

termination of his benefits at the end of the initial 24-month "own occupation" time frame. And, regardless of whether he submitted or did not submit new information in the time frame that Educators initially requested, he was entitled to a review of the denial of his "any occupation" disability benefits by a pair of fresh eyes engaged in impartial decision-making rather than the cursory dismissal he received from Educators.

After receiving the trial court's ruling (Record at 575-578) that Educators had never responded to Evans' "any occupation" appeal, Educators sent to Evans a March 22, 2006, letter denying his disability claim and giving him 60 days to appeal that denial. Record at 706. On May 19, 2006, Evans' counsel presented a timely appeal to Educators that contained new medical information and analysis to demonstrate that Evans was entitled to "any occupation" benefits. Record at 708-722. Educators' counsel responded in a letter dated July 7, 2006, and denied Evans' appeal. Educators denied Evans appeal, in part, because he had failed to provide the records Educators referenced back in January of 2004. Record at 724. The effect of presenting this basis to deny the claim was to eliminate the ability of Evans to meaningfully appeal Educators March 22, 2006, letter which gave Evans 60 days to appeal. As another basis to maintain Educators' denial, the letter also stated that Evans had not participated in a mandatory vocational rehabilitation program. Id. Educators' July 7, 2006, letter gave Evans another 30-day period in which to file a second appeal. Record at 725.

Evans counsel filed a timely second appeal in a August 3, 2006, letter and in subsequent follow up letters and documents presented additional information to prove Evans' entitlement to "any occupation" benefits. Record at 698, 734-747. Despite all

this, Educators maintained its denial of Evans' claim based on what it claimed was a lack of medical evidence. Record at 752-53. Meaningful rationale or analysis by Educators for its denial was completely absent in this last denial letter. There was nothing in the letter to show that Educators had engaged in any substantive consideration of the materials Evans had provided Educators in 2006. It is clear that Educators denied Evans' 2006 appeal based on the same erroneous application of its "hard and fast" procedural time frames that it applied in 2003 in dealing with Evans' first attorney.

All this information was presented to the trial court in opposition to Educators' Renewed Motion for Summary Judgment in later in 2006. However, the trial court granted Educators' motion based on Evans failure to comply with Educators' hair trigger deadlines in 2004. Record at 795-796. The unwillingness of Educators to apply claims review procedures that were fair and complied with the letter and spirit of the PELTDA infected its consideration of all aspects of Evans various disability claims from 2001 through 2006.

It is undisputed that both the 2001 version of the statute (U.C.A. § 49-9-102, referring to the need for municipalities who opt out of the PELTDA to provide "substantially equivalent" benefits) and the 2002 version of the statute (U.C.A. § 39-21-201(6), requiring that municipalities who opt out of the PELTDA provide "substantially similar" benefits to employees) prevent SLCC and Educators from straying far from offering a specific, defined package of rights and benefits to employees. Educators argues that its imposition of 60 and 30 day time frames to prematurely cut off otherwise valid claims by Evans is not a violation of this language from PELTDA. However

Educators' short time frames caused a substantive loss to Evans. Its procedural trip wires, as applied to the facts of his situation, cause a complete loss of benefits that would otherwise be considered on their merits and would likely allow for additional benefits to Evans. Thus, the differences between the statute and SLCC's plan, as administered by Educator's in this case, is the difference between Evans receiving and not receiving benefits.

With regard to the procedural deadlines, Educators asserts that "...under analogous federal law where a claimant fails to comply with the terms of the disability plan it is not arbitrary and capricious to deny benefits, even if the claimant, unlike Mr. Evans, would have qualified for benefits had he complied" (citation omitted). Educators' Brief, p. 20. But Educators ignores the difference between complying with the terms of the plan under which a claimant may obtain benefits based on being disabled (*e.g.* presenting proof of disability, etc.) and complying with a reasonable claims review process that is impartially and fairly applied. Evans acknowledges that if he cannot prove he was disabled under the terms of the plan, he is not entitled to benefits. But he must be given a fair chance to present his proof. At every step in the process, Educators failed to provide Evans that opportunity.

II. Educators Improperly Offset Evans' VA Disability Benefits

Educators relies on Shepherd v. Diversa-Cycle Products, 725 P.2d 1317, 1318 (Utah 1986) for its assertion that the 2001 version of the PELTDA rather than the 2002 version of that statute applies to this case. Shepherd does state that, in a worker's compensation setting, the law in effect at the time the injury arises applies to the case.

However, it is not difficult to see the distinction that exists for a disability claimant who has an ongoing obligation to prove his disabled status and a worker's compensation claimant whose right to benefits is tied to the specific time a work-related accident occurred. In any event, even if the 2001 version of the Utah code applies to this matter through the entire time frame associated with Evans disability, Educators acted improperly in offsetting his Veterans Affairs disability benefits. First, as demonstrated clearly in Evans Opening Brief, pp. 24-30, Armed Services disability benefits and Veterans Affairs disability benefits are not the same thing. Educators resorts to reviewing the mission statement of the department of Veterans Affairs to try and equate the two. However, this is a scant basis to refute the arguments and authority presented by Evans in his Opening Brief. The language of the United States Code, and cases interpreting it, is significantly more persuasive than the Department of Veterans Affairs' mission statement. Likewise, Feres v. United States, 340 US 135 (1950) simply does not get Educators where it needs to be. Ferres dealt with the extent to which the Federal Tort Claims Act applies to members of the armed services. It simply doesn't address the distinction between armed services and VA disability benefits.

Educators' second argument as to why it has the ability to off-set Evans' VA benefits even under the 2001 statute is that the VA benefits are a form of "employer-paid public or private retirement or disability program for which the employee is eligible." Educators' Brief, p. 22 (citing U.C.A. §49-9-402(2) (2001)). Educators' argument fails for two reasons.

First, this argument was never presented by Educators to the trial court in the proceedings below. It is well established that issues not properly raised in the trial court may not be raised for the first time on appeal. *See, e.g.* State v. Irwin, 924 P.2d 5, 7 (Utah Ct. App. 1996), *cert. den.*, 931 P.2d 146 (Utah 1997). *See,* also, Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 455, n. 31 (Utah 1993) (refusing to reach new points raised for the first time on appeal and declining to honor the distinction between "new arguments as opposed to new issues"). The only argument Educators ever made at the trial court for why it was entitled to offset Evans' VA benefits was that VA disability benefits and Armed Services disability benefits are the same thing. Consequently, because Educators' new argument was not raised in the proceedings below, Educators is precluded from raising it for the first time on appeal.

In any event, the argument must fail on its merits. The language referring to employer paid public or private retirement or disability programs simply does not on its face cover any disability benefits available to or provided through the U.S. government arising as a result of military service. This is true because the United States was never Evans "employer" in the sense of being either public or private employment. Rather Evans military service was a qualitatively different relationship than his employment with either a private employer or with his public employer, Salt Lake City, as a police officer.

Second, the framework of U.C.A. § 49-9-402 does not allow Evans' VA disability benefits to be equate to "employer-paid public or private retirement or disability program" in light of the fact that the same paragraph in the statute already refers to the

"armed services retirement or disability programs." Specific language in a statute must prevail over more general language if there is conflict between the two. Carter v. University of Utah Med. Ctr., 2006 UT 78, ¶12. The more general reference to "employer-paid public or private retirement or disability programs" must yield to the statute's specific reference to "armed services retirement or disability programs." Educators' argument rises or falls on whether Evans' VA disability benefits falls under the "armed services" reference at U.C.A. §49-9-402(2)(c).

In addition, Educators makes no attempt to analyze or explain the problem created for Educators when the trial court ruled that the changes to the statute in 2002 were clarifying rather than substantive. Record at 1075-76. The amendment to the statute in 2002 makes it much more clear that Evans' VA benefits fall outside the scope of the offsettable disability benefits identified in the statute. If those changes in the statute simply clarified the intent of the 2001 version of the statute, there is reason to project the more clear meaning of the 2002 amendments back to the legislative intent in the statute as it existed in 2001.

III. Given Educators' Pursuit of Litigation, The Arbitration Language in the Plan is Unenforceable

Educators' final argument is that the appeal presented by Evans' regarding the court's ruling on arbitration are moot because those claims were adjudicated by the district court in favor of SLCC which is in privity to Educators and thus is dispositive in Educators' favor also. The reasons that the court's ruling on arbitration are erroneous are addressed more specifically in Evans' Opening Brief and in Evans' Reply Brief to SLCC.

However, Educators' argument on this point is noteworthy because Educators acknowledges it was the agent for SLCC and that its action in pursuing litigation aggressively from 2004 until the present against Evans are imputed to SLCC. If, as Educators argues, there is a principal-agent relationship between SLCC and Educators, it substantially strengthens Evans' waiver argument regarding the choice by SLCC and Educators to pursue litigation rather than arbitration as a method of resolving the differences between the parties.

CONCLUSION

Evans served both his country and Salt Lake City honorably for many years. He was disabled by different injuries and conditions arising out of those periods of service. The repeated actions of Educators to reduce and, ultimately, to terminate his benefits prematurely, violate the requirements of the PELTDA. The trial court's rulings in favor of Educators should be reversed.

DATED this 2 day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been delivered via first class U.S. mail, postage prepaid, to the following:

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